



Strathprints Institutional Repository

Norrie, Kenneth (2013) From decriminalisation to marriage : changing judicial, political and religious attitudes in the United Kingdom to gay and lesbian families. In: Contemporary gender relations and changes in legal cultures. DJOF PUBLISHING, Copenhagen, pp. 181-210. ISBN 9788757427684 ,

This version is available at <http://strathprints.strath.ac.uk/44575/>

Strathprints is designed to allow users to access the research output of the University of Strathclyde. Unless otherwise explicitly stated on the manuscript, Copyright © and Moral Rights for the papers on this site are retained by the individual authors and/or other copyright owners. Please check the manuscript for details of any other licences that may have been applied. You may not engage in further distribution of the material for any profitmaking activities or any commercial gain. You may freely distribute both the url (<http://strathprints.strath.ac.uk/>) and the content of this paper for research or private study, educational, or not-for-profit purposes without prior permission or charge.

Any correspondence concerning this service should be sent to Strathprints administrator: strathprints@strath.ac.uk

From Decriminalisation to Marriage: Changing Judicial, Political and Religious Attitudes in the United Kingdom to Gay and Lesbian Families

by

**Kenneth McK. Norrie,
University of Strathclyde,
Scotland**

Introduction

In 2012, the year that Denmark opened marriage to same-sex couples, and as this paper is being written, the legal systems of the United Kingdom are moving closer towards the removal of the existing limitation on marriage to opposite-sex couples. This chapter will explore the remarkable cultural and legal change that has allowed, within barely more than a single generation, gay men and lesbians to move from their previous position of criminality, immorality and social exclusion to one of protected and legitimate full citizenry. The embracing of a human rights perspective in legal culture at the turn of the 21st Century is one of the important elements in explaining why this revolution of social and political attitudes has come about but it is not, as we will see, the only one and a shift of attitudes was clearly evident before then. This paper will also examine the attitudes of mainstream religion in the United Kingdom to modern legal norms that require non-discrimination principles to be extended to gay men and lesbians, and to same-sex couples. For it is organised religion that is, in 2012, providing the main focus of opposition to governmental plans to extend marriage to same-sex couples. Before doing so, however, it is as well to remind ourselves that, unlike most other vulnerable groups who have suffered centuries and

Header

even millennia of discrimination and social exclusion, gay men (in particular) faced the ultimate legal sanction of criminality for living their lives according to their own nature.

The Importance of Decriminalisation

The acceptance that Mr Justice Scalia of the United States Supreme Court is right on a matter of sexual orientation jurisprudence does not come easily to legal commentators who support sexual orientation equality and non-discrimination. Even more difficult to accept is that he was right in *Lawrence v. Texas*¹ when he dissented from the decision of the Supreme Court that struck down, as contrary to the US Constitution, the criminalisation of male-male sexual activity. Yet right he was, if in his reasoning though not his conclusion. “Today’s opinion” he states, with insight, “is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct.”² The decision of the majority, to strike down all anti-sodomy laws in the US,

“dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned. If moral disapprobation of homosexual conduct is ‘no legitimate state interest’ for purposes of proscribing that conduct ... what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising ‘[t]he liberty protected by the Constitution’? ... The Court today pretends that ...

¹ (2003) 539 US 558.

² (2003) 539 US at p. 602.

Sidehoved

we need not fear judicial imposition of homosexual marriage, as has recently occurred in Canada ... Do not believe it.”³

Though his motives were malign, his point is undeniable. Criminalisation of same-sex sexual activity, in a society that no longer unquestioningly takes its moral guidance from religious texts, provides the only sustainable firewall against claims for equality and non-discrimination, and removing that firewall therefore exposes discriminatory laws to the harsh spotlight of rationality. Moral disapprobation may well have virtually disappeared from judicial and political discourse in the UK (as elsewhere), but the fear of crime, as a subversion of society itself, remains and politicians continue to feel able to cast criminals in the role of other, of outsider, of wrongdoers who do not deserve the civic entitlements that full members of society take for granted.⁴ Removing criminality as well as moral disapprobation from same-sex sexual conduct becomes not only the start of the process towards equality and non-discrimination but is also the catalyst that, sooner or later, makes relationship recognition, as the ultimate expression of civic entitlement, inevitable.⁵

Changing Social Attitudes

It is not the purpose of this paper to identify whether legal developments have driven changes in social attitudes towards gay men and lesbians and to same-sex relationships or whether, instead, it is changing social attitudes that have created an environment in which legal changes can be effected.

³ *Ibid.*

⁴ As shown by the political furore that followed the European Court of Human Rights’ decision that the UK’s blanket ban on prisoners from voting in elections was an infringement of Protocol 1, art. 3 of the European Convention on Human Rights: *Hirst v. United Kingdom* (2006) 42 EHRR 411 and, particularly, *Greens v. United Kingdom* (2011) 53 EHRR 21. See for example “David Cameron Backs Prison Rebels” *The Telegraph* February 10, 2011.

Header

The two have, in all likelihood, gone hand in hand, the one feeding off, supporting and encouraging, the other. Legal developments will be discussed in detail later, but the change in social attitudes towards homosexuality has been traced by the British Social Attitudes Survey since 2000.⁶ This shows a continuous fall in the number of people in the United Kingdom who consider same-sex relationships to be always or mostly wrong (48% in Scotland and 46% in England in 2000; 40% in both Scotland and England in 2005; and 27% in Scotland and 29% in England in 2010), together with a concomitant rise in the number of those who consider same-sex relationships to be not wrong at all (29% in Scotland and 34% in England in 2000; 35% in Scotland and 37% in England in 2005; and 50% in Scotland and 44% in England in 2010). The Scottish Social Attitudes Survey 2010⁷ breaks the Scottish figures down in terms of gender, age and attendance at religious services.⁸ Unsurprisingly there is a significant age disparity and the natural demographics of population replacement can only serve to speed the rate of increase of the acceptability in (or indifference to) homosexuality. 46% of those over 55 held the view in 2010 that same-sex relationships are always or mostly wrong, but only 19% of those aged between 35 and 54 did so, falling to 13% for those aged between 18 and 34. 57% of those who attend a religious service at least once a week considered same-sex relationships to be always or mostly wrong; but only 24% of those who attend religious services at least once a month did so. These figures had fallen from 64% and 48% respectively in 2005.

⁵ A point made by K. Waaldijk, "Civil Developments: Patterns of Reform in the Legal Position of Same-Sex Partners in Europe" (2000) 17 Rev. Can. Dr. Fam. 62 at p. 86.

⁶ See 28th *British Social Attitudes Report*, National Centre for Social Research, 2010, Table 2.6.

⁷ Published by the Scottish Government at www.scotland.gov.uk/socialresearch.

⁸ *Scottish Social Attitudes Survey 2010*, Table 7.3.

It is implausible to imagine that this fall since the beginning of the 21st Century in the number of people opposed to same-sex relationships began only when these Surveys first asked the question in 2000, and it is likely that the trend started rather earlier, as decriminalisation removed an important inhibition on gay men and lesbians living openly.⁹ Throughout the 1980s and 1990s gay men and lesbians became much more visible in the community, in the mass media, and even in politics.¹⁰ This increased visibility helped to lessen the fear of the unknown¹¹ (homophobia, properly, being fear of rather than hatred towards, homosexuals¹²). The very normality of gay people, and their lives and relationships, helped to remove the preconception that gay people were deliberately seeking to subvert social and ethical norms,¹³ and this allowed an environment to develop in which law- and policy-makers felt able, and then obliged, to extend equality imperatives to gay men and lesbians, and to same-sex couples.

Changing Judicial Attitudes

⁹ An opinion poll reported in *The Economist* March 3, 2012, traces the fall in disapproval of same-sex relationships to 1990, after a sharp increase in the mid-1980s, explained, the article suggests, by the HIV-AIDS panic at that period.

¹⁰ It was a major news story in 1984 when Chris Smith MP became the first member of the British House of Commons to openly admit that he was gay (becoming, in 1997, the first openly gay minister in a British Cabinet). By 2010, the fact that the winning candidate, Ruth Davidson, MSP, to become the Leader of the Conservative Party in Scotland was a lesbian was barely worth mentioning in the press.

¹¹ The *Scottish Social Attitudes Survey 2010* (n.7 above) shows (Table 7.5) that people who personally know a gay man or lesbian are around twice as likely to support same-sex marriage as people who do not themselves know any gay or lesbian people.

¹² From “phobia”, defined in the *Shorter Oxford English Dictionary* as “(A) fear, (a) horror, (an) aversion: *esp.* an abnormal and irrational fear or dread aroused by a particular object or circumstance”.

¹³ See further M. McCormack, *The Declining Significance of Homophobia* (Oxford, OUP, 2012).

Header

Decriminalisation of male-male sexual conduct occurred at different points throughout the United Kingdom,¹⁴ with England and Wales leading the way in 1967,¹⁵ Scotland following in 1980,¹⁶ and Northern Ireland being (with deep reluctance) required to follow suit two years later¹⁷ after the European Court of Human Rights decision in *Dudgeon v. United Kingdom*¹⁸. It was not to be expected that the lives of gay men and lesbians (most of whom were never charged with any criminal offence) would change immediately on decriminalisation, and for some years thereafter social attitudes to homosexuality remained profoundly negative and served to ensure a continuing reluctance on the part of gay men and lesbians to live their lives openly and honestly. These social attitudes were reflected in the attitudes of judges who, when gay men or lesbians came to their attention (even beyond the confines of the criminal law), treated them with suspicion at best and contempt at worst. In, for example, *R v. Bishop*,¹⁹ eight years after decriminalisation in England and Wales, a witness in a trial for burglary was revealed to be a homosexual and the legal question this gave rise to was whether it would have any effect on his credibility as a witness. The Court of Appeal held that the witness's homosexuality, being a matter that indicated immorality, did indeed compromise the reliability of the witness. A person such

¹⁴ Though it is as well to note that decriminalisation was only partial, with a variety of provisions making criminal acts which, had they been heterosexual in nature, would be legally innocuous, such as advertising or soliciting for sex. Another difference was that decriminalisation did not extend to members of the armed services, who remained subject to court martial for any "homosexual offence": see for example *Secretary of State for Defence v. Wainwright* [1970] AC 394. The most noticeable difference, however, concerned the age of consent, which was originally 21 (as opposed to 16 for non-gay sex); after being reduced to 18 in 1994 the age of consent became 16 with the Sexual Offences (Amendment) Act 2000. Sexual orientation neutrality in criminal law was achieved in England and Wales by the Sexual Offences Act 2003 and in Scotland by the Sexual Offences (Scotland) Act 2009.

¹⁵ Sexual Offences Act 1967, s. 1.

¹⁶ Criminal Justice (Scotland) Act 1980, s. 80.

¹⁷ Homosexual Offences (Northern Ireland) Order 1982.

¹⁸ (1981) 3 EHRR 40, (1982) 3 EHRR 149.

¹⁹ [1975] QB 274.

as that was more likely than the “normal” person to tell lies and even to commit the criminal offence of perjury. A similarly attitude is shown in the child adoption case of *Re D (An Infant) (Adoption: Parent’s Consent)*,²⁰ where the House of Lords held that a father’s consent to the adoption of his child could be dispensed with because, as a homosexual, he had nothing to offer the child.²¹ The father’s influence, in the court’s view, was not likely to be other than harmful: a reasonable father would do all he could to protect his son from contact with homosexuals.²² It was pointed out²³ that Parliament in 1967 had only partially decriminalised “male homosexuality” and could not therefore be said to have taken a morally neutral view of that phenomenon. That homosexual conduct remained immoral, in the eyes of the law, even after decriminalisation is seen again in a case in which a newspaper that carried advertisements in its personal columns for men to meet other men, potentially for sexual purposes, was convicted of conspiracy to corrupt public morals and conspiracy to outrage public decency.²⁴

The issue arose with far sharper focus in the 1980s and early 1990s, when the courts were required to assess the impact of sexuality on the welfare of children in the context of child custody disputes. At this time, a mother’s lesbianism was treated as a strongly negative factor in her claim to custody of her child. In *Re P (A Minor) (Custody)*²⁵ the Court of Appeal in England rejected a father’s claim that his children, currently living with their mother,

²⁰ [1977] AC 602.

²¹ Per Lord Simon of Glaisdale at p. 639 and Lord Kilbrandon at p. 642. It passed without comment in the case that the mother had obtained a divorce against the father on the basis of the latter’s “cruelty” which was constituted by his homosexuality.

²² Per Lord Wilberforce at p. 628.

²³ Per Lord Simon of Glaisdale at p. 637.

²⁴ *Kneller (Publishing, Printing and Promotions) Ltd v. Director of Public Prosecutions* [1973] AC 435 (House of Lords). This is not surprising since sexual acts between males that fall short of the penetration needed to constitute the act of sodomy (buggery, in English law) were legally characterised as “gross indecency between males”.

Header

should be removed from her and placed in public care because the mother was a lesbian, but the Court expressed concern about the dangers to the child posed by the mother's lifestyle: allowing children to live "in proximity to sexual deviance", they said, could "only be countenanced by the courts when it is driven to the conclusion" that there was no acceptable alternative. Eight years later, the terminology of "deviance" had been dropped but it was still assumed that a parent's homosexuality was a strongly negative factor in a child custody dispute. In *B v. B*²⁶ custody was awarded to the lesbian mother after the judge examined the literature and found no evidence that children brought up by such mothers suffered harm, yet even in light of that lack of evidence the judge felt obliged to assert that it was important to distinguish between, on the one hand, lesbians like the mother in the present case "who were private persons who did not believe in advertising their lesbianism" and, on the other hand, "militant lesbians who tried to convert others to their way of life". Homosexuality was acceptable to the judge, but only if it was discreet and conforming, and there was no better option. In *Early v. Early*²⁷ the Scottish court removed an eight year old child from his mother who had always looked after him when she entered into a relationship with another woman, and transferred custody to the father with whom he had never stayed and who had two convictions for child neglect in respect of his other children. In *C v. C*²⁸ the judge at first instance had awarded custody of the child to the mother but was overruled by the English Court of Appeal for giving wholly inadequate weight to the fact that she had entered into a lesbian relationship.

²⁵ [1983] 4 FLR 401.

²⁶ [1991] 1 FLR 402.

²⁷ 1989 SLT 114; 1990 SLT 221.

²⁸ [1991] 1 FLR 223.

In most of these cases, as it happens, the mothers were able to retain custody of their children, which may indicate that the rhetoric of societal disapproval will readily give way to the judicial recognition of reality that children thrive in a stable and loving environment even when that environment fails to meet society's perception of the "ideal" – as, in truth, most families do, to some extent. A thawing in judicial attitudes is evident in *R v. Gray*,²⁹ which concerned a conviction for "importuning". The Court of Appeal held that whether an invitation to engage in homosexual conduct was "an immoral purpose" was a question for the jury to answer depending on the circumstances rather than a question of law that always demanded a positive answer. And in *Re D (An Infant) (Adoption: Parent's Consent)*,³⁰ already considered, Lord Kilbrandon was at pains to emphasise that the decision laid down no rule of law that homosexuals could never offer their children anything.³¹

The gradual softening of social attitudes to homosexuality throughout the 1980s and 1990s is given concrete expression in the watershed decision for judicial attitudes, *T, Petitioner*.³² In this Scottish case a gay man sought to adopt the child he had been looking after for some years. He had a male

²⁹ (1982) 74 Cr. App. Rep. 324.

³⁰ [1977] AC 602.

³¹ "It could easily be productive of injustice if one were to attempt any hard and fast rule as to the attitude which the courts ought to adopt, in custody, access or adoption matters, towards those whose sexual abnormalities have denied them the possibility of a normal family life. This is because it is not possible to generalise about homosexuals, or fair to treat them as other than personalities demanding the assessment appropriate to their several individualities in exactly the same way as each heterosexual member of society must be regarded as a person, not as a member of a class or herd. Naturally, in a family law context, the fact of homosexual conduct cannot be ignored, but no more can the consequences of taking it into account be standardised. The kind of influence, in this type of problem, which the fact may have will be infinitely variable" *per* Lord Kilbrandon at pp. 641-642.

³² 1997 SLT 724. For comments on this case, see K. Norrie, "Parental Pride: Adoption and the Gay Man" 1996 SLT (News) 321; M. Ross, "Attitudes to Sexual Orientation in Adoption Law" (1997) 1 Edin. L.R. 370.

Header

partner, and the judge at first instance, Lord Gill, refused the adoption order (which was, in fact, being opposed by no-one) on the ground that there was a fundamental question of principle as to whether the law permitted an adoption order to be made in favour of a man living in an admittedly homosexual relationship with another man. On appeal, however, the Inner House of the Court of Session overturned this decision holding, dismissively, that there was no such question of principle. The matter turned solely on the best interests of the child and it was open to anyone who objected to the adoption to bring evidence to the court to show that living with this applicant would be harmful to this child. But it was simply not open to a court, exercising a proper judicial discretion, to start off with a negative preconception about the dangers of homosexuality. A judge must base his decision strictly on the evidence that is put before him, and what he must *not* do “is to permit his own personal views, or his own private beliefs, to affect his judgment.” The English court made a similar decision soon afterwards.³³

It is of some significance that this change in judicial attitudes was first evidenced in cases involving children, where there tends to be the strongest political resistance to accepting the moral neutrality of sexual orientation.³⁴ The decision in *Fitzpatrick v. Sterling Housing Association*,³⁵ a case of fundamental importance, was perhaps made easier by the fact that it did not involve children. Here the House of Lords was faced with the question of whether a same-sex couple could be regarded as a “family” for the purposes of succession to a tenancy. The same question had been raised and answered negatively, both by the domestic court and at Strasbourg, some

³³ *Re W (Adoption: Homosexual Adopter)* [1997] 2 FLR 406.

³⁴ Parenting rights are frequently excluded from civil partnership legislation (see n.63 below) – though they were not from the UK legislation.

³⁵ [1999] 4 All ER 707.

fifteen years previously.³⁶ By a narrow 3-2 majority, the House of Lords held that such a couple could indeed, for statutory purposes, come within the concept of “family”. Once it had been accepted that a family could include a couple who were not married, there was no rational basis upon which a limitation of the concept to opposite-sex couples could be imposed. Though the immediate significance of the case was its extension of a particular, and statutorily limited, right to same-sex couples, its importance is far more profound for it shows that, even before the coming into force of the Human Rights Act 1998, the judges in the highest court in the United Kingdom were analysing a claim of right in terms of rational justification for limiting the right at issue to one sexual orientation rather than another.³⁷

Two months after *Fitzpatrick* the European Court of Human Rights held, for the first time, that sexual orientation discrimination came within the ambit of article 14 of the European Convention on Human Rights,³⁸ and within a very few years had declared that where states attempt to differentiate treatment of individuals according to their sexual orientation “there is a need for particularly convincing and weighty reasons to justify” such difference.³⁹ The European Court now stresses that “discrimination based on sexual orientation is as serious as discrimination based on race, origin or colour”.⁴⁰ The Human Rights Act 1998 came into force in 2000, and the strong statutory instruction that that Act gave British courts to interpret and apply all

³⁶ *Simpson v. Harrogate Borough Council* (1984) 17 Housing Law Rep. 205; *S v. United Kingdom* (1986) 47 D & R 274.

³⁷ It was more than ten years after *Fitzpatrick* before the European Court of Human Rights finally accepted that same-sex couples could claim “family life” as protected by Art. 8 of the European Convention: *Schalk v. Austria* (2011) 53 EHRR 20.

³⁸ *Da Silva Mouta v. Portugal* (2001) 31 EHRR 47.

³⁹ *Karner v. Austria* (2004) 38 EHRR 24 at para. 37 (raising exactly the same issue as faced the House of Lords in *Fitzpatrick*). See also *EB v. France* (2008) 47 EHRR 509 at para. 91; *Kozak v. Poland* (2010) 51 EHRR 16 at para. 92.

⁴⁰ *Vejdeland v. Sweden* (App. 1813/07) 9th February 2012, at para. 55.

Header

legal rules in a way that is consistent with the ECHR and Strasbourg jurisprudence had immediate effect.⁴¹ The Civil Partnership Act 2004 was not only accepted, but embraced, by the judiciary. Lord Walker may be found in 2006 saying “the enactment of the 2004 Act was possible only because of the profound cultural change which has occurred in most of Europe, within the last two generations, in attitudes towards homosexuality. Many people (and not only homosexuals) would say that that change has taken far too long, and they would be right”.⁴² Lord Hope, a few years afterwards, deprecates the “rampant homophobic teaching that right-wing churches indulge in throughout much of sub-Saharan Africa”,⁴³ in a case that involved a claim for asylum made by a gay man whose life would be in danger in his own country. The Supreme Court rejected (with some contempt, it may be noted) the argument of the immigration authorities that he could avoid the risk of harm by hiding his sexuality and living his life discreetly.⁴⁴ This less than 20 years after the English courts were requiring of lesbian mothers such discretion if they wished to retain custody of their own children.

Changing Political Attitudes

Responding to the same social changes in attitudes to homosexuality as the courts, the UK Parliament has similarly shifted from one of outright hostility towards, to one of embrasure of, gay men and lesbians and of same-sex

⁴¹ *Fitzpatrick* had refused to go as far as to hold that a same-sex couple were “living together as husband and wife” – the formulation used in a large number of UK statutes granting rights and responsibilities to unmarried couples – but as a direct result of the non-discrimination requirements in the ECHR the House of Lords reversed that position only five years later and held that any statute that gave benefits or imposed obligations on unmarried couples now had to be interpreted, in light of the Human Rights Act 2008, in a way that would include same-sex couples: *Ghaidan v. Mendoza* [2004] 2 AC 557.

⁴² *M v. Secretary of State for Work and Pensions* [2006] UKHL 11 at para. 92.

⁴³ *HJ and HT v. Secretary of State for the Home Department* [2010] UKSC 31 at para. 21.

⁴⁴ An argument that had already been rejected by the United Nations High Commission for Refugees *Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity* (UNHCR, 2008) at paras. 25-26.

relationships. It started badly. Only one year before Denmark introduced the world to the concept of a legally created status, separate from marriage, for same-sex couples,⁴⁵ the UK Parliament deliberately expressed profound antipathy towards such relationships by passing legislation of doubtful grammar but clear malign intent, prohibiting the promotion of the “acceptability of homosexuality as a pretended family relationship”.⁴⁶ This legislation was a reaction to what a majority in Parliament at that time regarded as an unwelcome social development: the palpable lessening of the social hostility faced by gay men and lesbians, and the encouraging of children to be tolerant of different ways of life. It is in the context of an increasing acceptance of homosexuality, an increasing understanding that gay men and lesbians were not deliberately choosing to subvert social norms but instead simply living their lives according to their own natures, that the passing of “section 28” is to be understood. That provision was intended as a replacement to the firewall protecting against relationship recognition that decriminalisation had removed: its aim was a Parliamentary attempt to counter the growing belief in the moral equivalence between gay and straight, same-sex relationships and opposite-sex relationships. Rather pleasingly, it had exactly the opposite effect since the passing of “section 28” proved a catalyst for gay rights activists: its very malignity attracted friends to the gay-rights movement from across the political spectrum.

It is not, however, surprising that little legislative progress was made while the Conservative Government responsible for “section 28” remained in power but that, and everything else, changed in 1997 when the Labour Government took over. Within a year, the Human Rights Act 1998 had been

⁴⁵ Denmark’s Act on Registered Partnership was enacted on 7th June 1989.

⁴⁶ Local Government Act 1988, s. 28, inserting s.2A into the Local Government Act 1986. I explore the (legal) meaninglessness of this provision in “Symbolic and Meaningless Legislation” (1988) 33 *Journal of the Law Society of Scotland* 310.

Header

passed, together with a constitutional restructuring of the United Kingdom itself with the establishment of devolved legislatures in Scotland, Northern Ireland and Wales. The Scottish Parliament may lay claim to be the first legislature within the United Kingdom that enacted legislation that, in dealing with family relationships, deliberately included same-sex couples to the same extent as opposite-sex couples,⁴⁷ and since then the statutory imperative for all the UK legislatures has been to do so, without discrimination. “Section 28” was repealed by the Scottish Parliament in 2000⁴⁸ and by the UK Parliament in 2003.⁴⁹ Throughout the Labour Government’s time in power (1997 – 2010) political hostility to same-sex relationships became confined to the far right and even the party responsible for “section 28”, the Conservative Party, did not oppose the civil partnership legislation in 2004 and, since 2010 in coalition government with the Liberal Democrats (long supporters of equality legislation), have promoted an equality agenda that moves beyond civil partnership for same-sex couples.

Relationship equality within family law was further advanced when same-sex couples were given parity with opposite-sex couples in the new adoption legislation which removed the restriction on couple adoptions to married couples.⁵⁰ The extension of cohabitants’ rights in Scotland (not replicated elsewhere in the United Kingdom) embraced same-sex couples.⁵¹ And the Human Fertilisation and Embryology Act 2008, which applies through-

⁴⁷ The Adults with Incapacity (Scotland) Act 2000, s. 87(2) defines “nearest relative” within the mental health legislation to include members of conjugal same-sex couples.

⁴⁸ Ethical Standards in Public Life (Scotland) Act 2000, s. 34.

⁴⁹ Local Government Act 2003, Sched. 8 Pt 1.

⁵⁰ See the Adoption and Children Act 2002, s. 144(4) (for England and Wales) and the Adoption and Children (Scotland) Act 2007, s. 29 (for Scotland). For Northern Ireland, see *Re P (A Child) (Adoption: Unmarried Couples)* [2008] UKHL 38.

⁵¹ Family Law (Scotland) Act 2006 which not only created new rights (and liabilities) for both types of couple but also extended all existing rights (and liabilities) to same-sex couples.

out the United Kingdom, replaced its 1990 predecessor and removed the provision that allowed clinics and hospitals to limit their services to married women and heterosexual couples.⁵² It also extended the definition of parenthood, in circumstances when artificial reproductive technology had been used, to include same-sex couples: now a child may have a mother and another “parent” who is the same sex as the mother⁵³ and parental orders (conferring parenthood by order of the court) can be granted to couples of any gender mix after a surrogacy arrangement has been given effect to.⁵⁴

The Civil Partnership Act 2004

These legislative developments, important as they are, did nothing more than equate same-sex couples with opposite-sex *unmarried* couples. The ability to access the universal rights and responsibilities available to opposite-sex couples through the institution of marriage came with the passing, again without significant political opposition, of the Civil Partnership Act 2004. Opposition came mainly from religious bodies, who have long claimed to have a special voice in relation to the institution of marriage, and the 2004 Act was deliberately designed in a way that it was hoped would neutralise opposition from that source. So for example it excluded opposite-sex couples, to prevent civil partnership from being seen as a secular alternative to marriage.⁵⁵ Instead, its aim was to provide a means by which all the rights and responsibilities currently available to opposite-sex couples

⁵² This was the aim (though in truth not the legal effect) of s.13(5) of the Human Fertilisation and Embryology Act 1990 which originally required providers to take account of the need of the child for a father. This was amended in 2008 to read that account had to be taken of the need of the child for supportive parenting.

⁵³ Human Fertilisation and Embryology Act 2008, ss. 42-47.

⁵⁴ Human Fertilisation and Embryology Act 2008, ss. 54-55.

⁵⁵ There are long and tedious rules designed to ensure that this gender mix is not affected by the fact that one of the parties changes sex, something finally permitted in UK law only months before the Civil Partnership Act 2004 was passed, with the Gender Recognition Act 2004.

Header

through the institution of marriage could become available to same-sex couples through an equivalent, but quite distinct, institution. For the same reason, civil partnership was deliberately designed to be an entirely secular institution which could not be brought into existence, as marriage can, through religious ceremony. Only a state official, the district registrar, is able to bring a civil partnership into existence by registration. Also, as originally passed for all three jurisdictions in the United Kingdom, it was explicitly forbidden to use places that are (or were in the past) used solely or mainly for religious purposes.⁵⁶ These rules remain as originally enacted in Scotland and in Northern Ireland, but were amended for England and Wales when the Equality Act 2010 allowed for the approval of religious premises in which civil partnership registrations may take place, so long as the religious body that owns or controls the premises wishes.⁵⁷ For England and Wales, at least, the complete secularity of civil partnership has been broken, though there remain rules against the participation of religious officials in the registration process.

The other major difference between marriage and civil partnership is that there is no sex in civil partnership. Marriage remains, at least to some extent, a sexual relationship, that is to say one in which it is expected that the parties' relationship will be sexual, and within which sexual norms will be enforced. This perception of marriage is explained by its religious history. Most Christian religions have long seen marriage as the sole legitimization of the sexual act, and the modern law of marriage in all parts of the United Kingdom still retains vestiges of this sacramental view of marriage. So for example the canon law crime of adultery – sexual intercourse by a married

⁵⁶ Civil Partnership Act 2004, section 6, as originally passed (England and Wales), section 93 (Scotland), section 144 (Northern Ireland).

person with someone he or she is not married to – is deemed to constitute the irretrievable breakdown of the marriage and so provide a ground for divorce.⁵⁸ This is not, however, a ground for dissolving a civil partnership, though all the other (non-sexual) grounds for divorce are replicated as grounds for dissolving a civil partnership. Another manifestation of the importance of the sexual act within marriage is seen in the still extant rules relating to consummation and impotency. In England and Wales a marriage is voidable (that is to say can be annulled and treated as if it never had been) if it is not consummated;⁵⁹ in Scotland a marriage is voidable if one or other of the parties is, at the date of the marriage, incurably impotent (that is to say unable to consummate the marriage).⁶⁰ Neither of these rules was replicated for same-sex couples in the civil partnership legislation.⁶¹

However, other than these peculiarities concerning the creation of a civil partnership, which serve to differentiate the concept from marriage – and isolate civil partnership from the sphere of religion – the actual consequences of both relationships, once created, are virtually identical. It is for this

⁵⁷ Equality Act 2010, s. 202, given effect to by Marriages and Civil Partnerships (Approved Premises) (Amendment) Regulations 2011/2661, which came into force on 5th December 2011.

⁵⁸ Divorce (Scotland) Act 1976, s. 1(2)(a); Matrimonial Causes Act 1973, s. 1(2)(a) (England and Wales).

⁵⁹ Matrimonial Causes Act 1973, s. 12(a) (inability to consummate) and (b) (wilful refusal to do so). Consummation of marriage is constituted by full penile penetration of the vagina at some point after the parties have been declared to be husband and wife. If this never occurs, then the marriage may be declared null by a court of law. The Roman Catholic Church will also treat the marriage as if it had never been, so providing Roman Catholics with a means of escaping from an unsatisfactory marriage without calling it “divorce”.

⁶⁰ In Scotland this is a common law rule that has never found its way into statute.

⁶¹ An interesting practical consequence of removing sex from the relationship is provided from Ireland where similarly civil partnership is entirely asexual. It has been reported that two elderly women, both heterosexual, entered a civil partnership with each other so that one could inherit the other’s property without paying death duties. This could not be achieved by marriage as the lack of conjugal intention would render the marriage a “sham”

Header

reason that civil partnership in the United Kingdom might legitimately claim to be “marriage in all but name”.⁶² There are fewer distinctions made in UK law between marriage and civil partnership than in most other jurisdictions that have introduced a marriage-equivalent as the means of achieving gay and lesbian equality in family law.⁶³ It follows that any human rights challenge on the basis that same-sex couples are being discriminated against by not being able to marry has less chance of success in the United Kingdom than in many other European countries where the limitation of same-sex couples to a distinct but equivalent regime limits them to a regime with less rights, obligations and liabilities than opposite-sex couples who can access marriage.⁶⁴

Continuing Religious Opposition

marriage. See report at www.jillkerby.ie/blog/sundaytimes_moneycomment (5th February 2012).

⁶² See for example N. Bamforth, “The Benefits of Marriage in All but Name? Same-Sex Couples and the Civil Partnership Act 2004” (2007) 19 CFLQ133. The European Court of Human Rights, in *Burden v. United Kingdom* (2008) 47 EHRR 38 at para. 65 equated civil partnership with marriage and distinguished them both from unregistered cohabitation: “There can be no analogy between married and Civil Partnership Act couples, on the one hand, and heterosexual and homosexual couples who choose to live together but not to become husband and wife or civil partners, on the other”.

⁶³ Parenting of children by gay and lesbian people is usually the issue that legislatures draw the line at: even Denmark, when it first introduced registered partnerships for same-sex couples in 1989, excluded the parenting of children and an effect and that exclusion remains in many countries that have introduced civil partnership legislation. See, most recently, the Republic of Ireland’s Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, which excludes civil partners from jointly adopting a child or holding joint guardianship in relation to a child.

⁶⁴ In *Wilkinson v. Kitzinger* [2006] 2 FLR 397 a female couple who had married in Canada sought to have their relationship recognised in England as a marriage (rather than as a civil partnership, the 2004 Act converting all overseas formalised relationships involving same-sex couples into civil partnerships) but they failed because the judge saw no practical distinction other than the name between the two institutions. Implicit in his judgment is that there is no human right to call the relationship one thing rather than another. See R. Auchmuty, “What’s So Special About Marriage? The Impact of *Wilkinson v. Kitzinger*” (2008) 20 CFLQ 475.

Society ~~in general as a whole~~ and lawmakers – whether judges or legislators – have thus seemed to embrace the moral neutrality of sexual orientation. Not so religion. Religion remains, in the words of Kay Goodall,⁶⁵ “the only powerful current ethical framework in Western states which holds sexual orientation to be a relevant factor by which to make fundamental judgments about the worth of individuals”. Religious opposition to the legal recognition and regulation of same-sex couples has become much more muted since the Civil Partnership Act 2004 was passed, though the mainstream religions in the United Kingdom continue to struggle to find the correct response to the profound changes in society that the Act represents.⁶⁶ Few churches actively seek the repeal of the 2004 Act, but only a very few small denominations are willing to embrace its terms. The Church of England has since 2005 (when the 2004 Act came into force) prohibited its priests from granting blessings to civil partners⁶⁷ and it reinforced that message when civil partnership registrations became possible in religious places, by prohibiting the use of Church of England premises for that purpose.⁶⁸ That church continues to suffer bitter divisions about the possibility of gay priests becoming bishops,⁶⁹ at the same time (and not accidentally) as it suffers virtually identical divisions at the idea of women bishops.⁷⁰ The Church of Scotland was deeply split in 2011 on the question of whether members of

⁶⁵ “Challenging Hate Speech: Incitement to Hatred on Grounds of Sexual Orientation in England, Wales and Northern Ireland” (2009) 13 Int. J. H.R. 211 at pp.215-216.

⁶⁶ See J. Rivers, “Law, Religion and Gender Equality” (2007) 9 Ecc. L.J. 24 who, at pp. 33-39, traces the struggle that religions have had in the face of what he calls modern society’s more “plastic” conception of gender.

⁶⁷ House of Bishops, *Pastoral Statement* 25th July 2005.

⁶⁸ Church of England General Synod (GS Misc 1005) 2nd December 2011.

⁶⁹ See “Archbishop of Canterbury Faces Defeat on Gay Deal” *The Telegraph* March 3, 2012, reporting the rejection of a proposal to prohibit openly gay priests from becoming bishops.

⁷⁰ It is as well to remember here that, the Church of England being the established (state) church, its 26 most senior bishops are guaranteed a seat in the House of Lords: the result is that even today 26 seats in the UK legislature are reserved for males who are (or claim to be) heterosexual.

Header

civil partnerships (ie non-celebrate gay people) could be ministers of the church and the General Assembly of the Church of Scotland voted (not untypically) to postpone making a decision on the subject until 2013.⁷¹ The Roman Catholic Church does not suffer (in public, at any rate) the same divisions, being unquestioningly opposed to any legal recognition of same-sex relationships. While preaching tolerance towards gay and lesbian individuals, it remains appalled at the very idea of gay sex,⁷² and it has been at the forefront of the opposition in Scotland to the Scottish Government's plans to open marriage to same-sex couples.⁷³ To be fair to that church, however, its disapproval of gay sex should be seen within the context of its more general disapproval of any sexual act other than the potentially procreative. Its continuing opposition to the use of contraception is traced to the same ideology that sees sexual acts as justified solely by the role that they play in the creation of human life. Limiting access to birth control has, of course, a disproportionate effect on women, who overwhelmingly bear the costs (both physical and economic) of procreation. Thus it is that denying the legitimacy of any form of non-procreative sex is the basis both for discrimination against gay people and for the *weltanschauung* that relegates women to a secondary role of service providers for the male polity.⁷⁴ Gay people and women have a common cause against the religious traditionalism embodied in current Roman Catholic (and indeed Anglican) church doctrine.

⁷¹ *Report of the Special Commission on Same-Sex Relationships and the Ministry* (Report to the General Assembly of the Church of Scotland, May 2011).

⁷² The Catechism of the Roman Catholic Church at 2359 demands that gay and lesbian people accept that they are "called to a life of chastity".

⁷³ See *Sunday Telegraph* March 4, 2012, in which Cardinal O'Brien, a Scottish Archbishop and the most senior Catholic cleric in the United Kingdom, described the plans as "a grotesque subversion of a universally accepted human right" and (somewhat bemusingly) likened the proposal to allow same-sex couples to marry to a proposal to legalise slavery.

⁷⁴ See further A. Stuart, "Freedom of Religion and Gender Equality: Inclusive or Exclusive?" (2010) 10 HRL Rev. 429.

While institutional religion has sought to influence the political debate, individual religious believers have sought to challenge particular applications of the equality norms that the 2004 Act most effectively represents. In doing so they raise starkly the question of the extent to which religion and religious believers can be exempted from secular laws that contradict their beliefs.⁷⁵ Article 9 of the European Convention on Human Rights, which attempts to strike a balance between non-discrimination and religious freedom by guaranteeing an unqualified right to freedom of thought, conscience and religion, but allowing any manifestation of religion or belief to be subjected to such limitations as are prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others, has proved to be of very little help to those who seek to manifest their religious beliefs by treating gay men and lesbians, and same-sex relationships, differently from (inevitable, less well than) non-gay people and opposite-sex couples.⁷⁶

In *Ladele v. Islington Borough Council*⁷⁷ the claimant, who was a district registrar, asked her employers to exempt her from having to register civil partnerships since, as “an orthodox Christian”, she regarded civil partnership as an attack on (opposite-sex) marriage, which was the only form of sexual relationship sanctioned by her god. When this request was refused, she sued her employers on the ground that they had discriminated against her because of her religious beliefs. The claim was rejected by the Court of Appeal. It was her refusal to do a part of her job and not her religious be-

⁷⁵ This question is examined more broadly, in the context of a number of legal systems’ approach to gender equality, by F. Raday, “Culture, Religion and Gender” (2003) Int J. Con. Law 633. Her conclusion that women always lose out when cultural or religious norms are applied by courts in preference to human rights or equality norms is hardly surprising and sounds a clear warning for gay and lesbian people.

⁷⁶ See L. Vickers *Religious Freedom, Religious Discrimination and the Workplace* (Hart Publishing, 2008).

⁷⁷ [2010] 1 WLR 955. See A. Hamblen, “A No-Win Situation for Public Officials with Faith Convictions” (2010) 12 Ecc. L.J. 3.

Header

liefs that was the reason for her dismissal: anyone would have been dismissed for that reason whether their motivation was religious or otherwise. She could not be allowed to give effect to her religious beliefs when this would be contrary to the policies and practices of her employers, who were legally bound to provide a public service without discrimination on the basis of sexual orientation.

The same result was reached in *McFarlane v. Relate (Avon) Ltd*⁷⁸ where an employee of a company that provided relationship counselling services was dismissed for refusing to provide these services to same-sex couples. The case is eloquent in its defence of secularism as the correct – indeed only legitimate – approach to judicial reasoning. It rejected out of hand the notion that individuals can claim exemption from the general law based solely on their religious beliefs. Laws LJ said this:

“The conferment of any legal protection or preference upon a particular substantive moral position on the ground only that it is espoused by the adherents to a particular faith, however long its tradition, however rich its culture, is deeply unprincipled. It imposes compulsory law, not to advance the general good on objective grounds, but to give effect to the force of subjective opinion”.⁷⁹

⁷⁸ [2010] IRLR 872.

⁷⁹ At para. [23]. The European Court on Human Rights ~~heardis due~~, on September 4, 2012, ~~to hear~~ arguments in applications made by Ms Ladele and Mr McFarlane that the results in the UK courts meant that domestic law had failed adequately to protect their rights to manifest their religious beliefs, contrary to Art. 9 of the Convention, taken alone or in conjunction with Art. 14: see *Ladele and McFarlane v. United Kingdom* App. Nos 51671/10 and 36516/10.

The Court of Appeal returned to the issue in *Bull and Bull v. Hall and Preddy*⁸⁰ where hoteliers were held to have acted unlawfully in refusing a same-sex couple a double room in their hotel. They had argued that, following an orthodox Christian belief that sexual relations were legitimate only within the context of marriage, they were entitled to insist that only married couples be allowed double rooms in their hotel for to do otherwise would require them to be complicit in the “promotion of sin”. The court had little difficulty in holding that, since opposite-sex couples were able to marry while same-sex couples were not, the effect of putting into practice a belief that only married couples could legitimately have sexual relations was to discriminate against same-sex couples and was therefore unlawful.⁸¹ Article 9(1) of the European Convention provided no defence, since Article 9(2) allowed the state to prevent the hoteliers from manifesting their religious beliefs in the moral superiority of heterosexuality over homosexuality by refusing a double room to a same-sex couple, because such a limitation was necessary in a democratic society for the protection of the rights and freedoms of same-sex couples not to be discriminated against.

The result in all these cases was relatively easy for the courts to reach. The Civil Partnership Act 2004 was so deliberately structured to differentiate civil partnership from marriage that the lawyer’s answer to Ms Ladele (for example) was easy: civil partnership has nothing to do with marriage but is a secular means by which the state effects the legal regulation of some couples, so her objection that it attacked marriage was simply mistaken.⁸²

⁸⁰ [2012] EWCA Civ. 83, [\[2012\] 2 All ER 1017](#). See also *Black v. Wilkinson (County Court, Reading, October 18, 2012)*.

⁸¹ Under the Equality Act (Sexual Orientation) Regulations 2007 (now replaced by the Equality Act 2010).

⁸² Another argument, of course, is that since there is such disagreement amongst Christians as to how they should regard homosexuality there was, in fact, no “requirement” of Ms Ladele’s faith to discriminate against same-sex couples. In *R (Playfoot) v. Millais School*

Header

Likewise, the lawyer's answer to the hoteliers in *Bull and Bull v. Hall and Preddy* was easy – providing access to a double room does not “promote” sin.⁸³ But these answers do not address the real complaint of such religious traditionalists, which is the message of tolerance and moral equivalence that the Civil Partnership Act so powerfully represents. The state is saying loud and clear what religious traditionalists vehemently deny: that gay and lesbian people are no longer to be seen as morally inferior to heterosexual people. The “moral disapprobation” that Scalia J wanted the US Supreme Court to preserve is officially and comprehensively rejected in the United Kingdom.

The battle, in truth, is between secularism and faith, between universally applicable law and religiously mandated personal law, but this is a battle that, in western Europe at least, was lost long ago. All the legal systems in the developed western world are based, more or less, on the Enlightenment principles of secular democracy.⁸⁴ One of the most important practical consequences of that – so self-evident that it seldom requires to be explicitly stated – is that courts operate through a system of testing evidence, not only of facts but of propositions. No moral conclusion is today accepted axiomatically and any stated proposition will gain judicial credence only by being justified either by factual evidence or by human rationality. Since at

Governing Body [2007] EWHC 1698 (Admin) the court held that a school rule banning the wearing of rings did not interfere with the religious freedom of a pupil who wished to wear a ring to symbolise her commitment to pre-marital purity: there was no religious *requirement* to wear such a ring which was therefore a matter of personal choice, merely influenced by religious considerations and so not covered by Article 9.

⁸³ Just as a nurse's supervision of a labour ward is not the involvement of that nurse in the termination of pregnancy carried out on patients in that ward: *Doogan and Woods, Petitioners* [2012] CSOH 32, where ward supervisors were held not entitled to claim the conscientious objection to the “participation” in the termination of pregnancy provided for in s.4(1) of the UK's Abortion Act 1967.

⁸⁴ See A. Sajo, “Preliminaries to a Concept of Constitutional Secularism” 2008 Int J. Con. Law 605.

least the Human Rights Act 1998, all UK legislation has been subject to judicial oversight of its (secular) rationality.⁸⁵ Religions, on the other hand, work quite differently and, at least with the Abrahamic religions (or “religions of the book”⁸⁶), operate through revelatory texts.⁸⁷ Religious reasoning starts from “the truth”, being the revealed word of God, as recorded in immutable texts, and human propositions and moral judgments are deduced from the text. Different strands of each religion give more or less flexibility in interpreting these texts, but it is a definitional feature of religious belief that the text itself is the foundation of any moral position and cannot itself be challenged. This is the very reverse of the secular rationalism applied by courts of law where truth is the end point, the rationally deduced conclusion from evidence or reasoning against which all propositions of social good are tested.⁸⁸ There is no longer any legal assumption, traced to a foundational text (such as a law criminalising gay sex), that gay people are less worthy of respect than non-gay people. Secular rationalism would have no problem in allowing differential treatment if social evidence showed that gay people do in fact constitute some risk to society. It was the realisation that such social evidence simply does not exist that has persuaded most western countries to reject their previous assumptions about the social and moral inferiority of gay and lesbian people. Religious traditionalists, however, by adhering to revelatory truths, reject the need for social evidence and rely instead on di-

⁸⁵ Baroness Hale, in *Ghaidan v. Mendoza* [2004] UKHL 30 at para. 132, talked of “the rational behaviour we now [since the coming into force of the Human Rights Act 1998] expect of government and the state”, adding, “If distinctions are to be drawn, particularly on a group basis, it is an important discipline to look for a rational basis for those distinctions”.

⁸⁶ That is to say Judaism, Christianity and Islam.

⁸⁷ See F. Raday, “Culture, Religion and Gender” (2003) *Int J Con. Law* 663.

⁸⁸ I explore this clash between the secular rationalism of modern jurisprudence and what I call the “revelatory rationalism” of theology more fully in “Accommodating Religion to the Gay Equality Imperative in Family Law” in J. Mair and E. Orucu (eds) *The Place of Religion in Family Law: A Comparative Search* (Intersentia, 2011).

Header

vine text for their moral guidance. “We walk by faith, not by sight”⁸⁹ is the crucial, definitional, characteristic of religious belief, but it is a proposition that any court of law (at least one operating within the parameters of secular rationalism) is bound to reject. To do otherwise would allow any individual to claim exemption from any legal rule on the basis solely of their own religious or philosophical conviction that they ought not to be subjected to that rule. Law, however, enforced through the police power of the state, must apply to everyone, whether they agree with it or not. That is, quite simply, the definition of “law”.

The Coming of Marriage

This battle between secularism and faith as the guiding principle for legal development has now moved to the political stage and religious traditionalists hope to find it easier to persuade politicians than judges that the law should continue to reflect moral propositions traced ultimately to religious texts. The mainstream religions in the UK have long claimed a special voice in the way family life is regulated by the law and, in 2012, they are united in their opposition to changes to one family law concept – marriage – that is claimed to be, though a legal concept, one that is of uniquely religious import.⁹⁰ Both the Scottish Government⁹¹ and the British Government⁹² (representing England and Wales) have issued public consultations on the question of opening marriage to same-sex couples. Though the de-

⁸⁹ II Corinthians 5:7.

⁹⁰ Indeed marriage is a concept that both defines and differentiates various Christian traditions. Changes to marriage laws – and in particular the introduction of divorce – was characteristically one of the first manifestations of the legal effects of the Reformation: see J. Witte, “Church, State and Marriage: Four Early Modern Protestant Models” (2012) 1 Ox. J. Law and Rel. 151.

⁹¹ *The Registration of Civil Partnerships: Same-Sex Marriage: A Consultation*, Scottish Government, Edinburgh 2011.

tails of each consultation differ,⁹³ both are responses to claims from gay rights supporters that, the content of marriage and civil partnership being (in the United Kingdom) virtually identical, the withholding of the name “marriage” from same-sex couples achieves nothing other than to deny them the dignity and respectability that (it is said) is uniquely conferred by the status of marriage. This profoundly secularist argument persuaded the United States Court of Appeals for the Ninth Circuit to strike down “Proposition Eight”,⁹⁴ which was a constitutional amendment, approved by plebiscite in 2008, that removed the right of same-sex couples in California to marry.⁹⁵ The court based its conclusion on the fact that Californian law (like UK law) granted to same-sex couples all the substantive rights of married couples through the institution of domestic partnership and that the only effect of Proposition Eight was to remove the name “marriage” from same-sex relationships. Though this imposed no substantive legal loss, it served “to lessen the status and human dignity of gays and lesbians in California, and to officially reclassify their relationships and families as inferior to those of opposite-sex couples”.⁹⁶ As such, the court held that Proposition Eight was unconstitutional since it achieved no legitimate state purpose. It is this

⁹² *Equal Civil Marriage: A Consultation*, Government Equalities Office, March 2012.

⁹³ The Anglo-Welsh consultation was limited to civil marriage while the Scottish consultation included both religious marriage and religious civil partnership. The Anglo-Welsh consultation disclaimed any need to amend civil partnership in any way at all and so excludes from consideration the question of whether to open civil partnership to opposite-sex couples, while the Scottish consultation asked whether there would be any need to retain civil partnership at all if marriage were opened to same-sex couples. The Scottish Government is, however, more cautious, asking whether to open marriage, while the UK Government is more explicit that this will happen and so asks how best to achieve the opening of marriage announced on September 4, 2012 that it would include a bill to open marriage to same-sex couples in its 2012-13 legislative programme and it published its bill on XX December 2012. The British Government is likely to follow a similar timetable: see “Gay Marriage Could be Approved within Weeks”, *Telegraph* November 23, 2012.

⁹⁴ *Perry and Ors v. Brown* 671 F 3d 1052 February 7, (2012).

⁹⁵ Such couples having been granted that right by judicial decision less than a year previously: *In Re the Marriage Cases* (2008) 43 Cal 4th 757.

⁹⁶ *Perry v. Brown* at p. 5.

Header

thinking that lies behind both the Scottish and the UK Governments' proposals.

The responses of the mainstream churches in the United Kingdom have been uniformly negative. Both governments took pains to emphasise that no religious organisation will be forced to conduct marriage ceremonies that are contrary to their own doctrinal beliefs – and indeed the English proposals are consultation is limited to civil marriage that has no religious case – thus allowing the Church of England to avoid an internal debate on the issue similar to the destructive debates it continues to have in relation to women bishops⁹⁷. This makes it very difficult for the churches to oppose the Governments' plans on the basis of their doctrinal beliefs, since to embody these beliefs in law would be to impose their own beliefs on other religious bodies (and, through the state, everyone else itself) who do not hold beliefs – which is the very thing that the mainstream churches want to avoid happening to themselves.

It is for this reason that the main argument being propounded by the churches opposing the opening of marriage to same-sex couples is that it is simply not open to *any* religion or state authority to alter the existing and long-standing definition of marriage.⁹⁸ This argument is ostensibly based on the assertion that marriage as an opposite-sex relationship is either a natural

⁹⁷ On November 20, 2012, the General Synod (governing body) of the Church of England once again rejected proposals to allow women to become bishops: see “Women Bishops: A Failure of Leadership” *Telegraph* November 23, 2012.

⁹⁸ This argument is made both by the Church of England and the Roman Catholic Church: see the comments of the Archbishop of York (the second most senior cleric in the Church of England) in an interview published on January 27, 2012 in the *Daily Telegraph*, and of Cardinal O'Brien, the most senior UK cleric in the Roman Catholic Church, in an article published in the *Sunday Telegraph* on March 4, 2012. See also the Archbishop of Glasgow's "Statement on Marriage" in which he set out the Roman Catholic Church's response to the Scottish Government's Consultation:

www.scottishcatholicmediaoffice.org.uk/articles/archbishop-mario-conte-issues-statement-on-marriage.html

phenomenon or a divinely-created institution – in either case a rule of mankind cannot overturn a rule of nature or of God.⁹⁹ In truth, however, this is an argument about who has power to change marriage rules, not whether anyone can do so at all. Legal systems have frequently moved away from those rules of marriage, traced to religious texts, that no longer serve the needs of society – and many religious bodies have felt able to alter their understandings of scripture to accommodate these changes. The most obvious example in recent times in the United Kingdom is the Marriage (Prohibited Degrees of Relationship) Act 1986 which removed many of the prohibitions on (non-blood) relatives marrying each other that were traced to the Book of Leviticus.¹⁰⁰ The “definition” argument fails to grasp – indeed denies – that marriage has become today a legal institution through which the state identifies who is entitled to certain rights and subjected to certain obligations. This is not to say that marriage may not also be regarded as a religious sacrament, or that the state (as opposed to religious authorities) may well have no capacity to amend the definition of any religious sacrament which is, necessarily, a self-defined idea. But in its manifestation as a legal institution, regulated in the United Kingdom by the Marriage Act 1949 (for England and Wales), the Marriage (Northern Ireland) Order 2003¹⁰¹ (for Northern Ireland) and the Marriage (Scotland) Act 1977 (for Scotland), marriage is as open to legislative change and development as (for example) is the age of majority. Any religious body remains free to set different parameters to

⁹⁹ Of course, in Roman Catholic theology traced to the writings of St Thomas Aquinas (particularly *Summa Theologiae*), divine law is natural law: see “The Natural Law Tradition in Ethics” in *Stanford Encyclopedia of Philosophy* (2002). The sense of using “nature” as the determinant of moral good is comprehensively rejected by K. Goodall in “Human Rights Pitted Against Man (II): A Response” (2010) 14 Int. J. HR 1165 at pp. 1179-1182.

¹⁰⁰ Others had previously been removed by statutes such as the Deceased Wife’s Sister’s Marriage Act 1907 and the Deceased Brother’s Widow’s Marriage Act 1921 (both of which are limited to England and Wales where particular biblical injunctions had been accepted): see S. Cretny *Family Law in the 20th Century: A History* (Oxford, OUP 2004) at pp. 48-57.

¹⁰¹ S.I. 2003 No. 413.

Header

its religious institution, currently also called “marriage”, different from those applying to the legal institution and in fact there are numerous instances of such bodies having done so. The Roman Catholic Church, for example, defines marriage as a religious sacrament and therefore as an indissoluble union. But the indissolubility of marriage in the eyes of that Church has no effect in law and does not deny access to the divorce courts to those who married according to Roman Catholic rites or who even now adhere to the Roman Catholic faith. The Church of England (in many respects the Church of Rome without the Pope) refuses to marry in church ceremonies people who have been divorced and whose (ex)-spouses still live,¹⁰² but such people remain entirely free to marry in law, either by civil ceremony or in a church that has fewer qualms about divorce.¹⁰³ Faith and its incidents may well affect the behaviour and lifestyles of individual people who choose to adhere to a particular religious group, but law and its incidents apply – by definition – to everyone. Churches that deny the distinction between the religious sacrament of marriage and the legal institution of marriage are asserting a power over the state, and this is not a power that a modern secular state can ever concede.

A more subtle – but also more dangerous – variation of the definition argument is that marriage is necessarily and by definition a reflection of the essential complementarity between men and women. There is a long theological tradition (not only in Christianity, but also in Judaism and Islam) that takes from scripture a divinely ordained separation of the roles of the gen-

¹⁰² Which is why the Prince of Wales, when he married his present consort whose previous husband was still alive, was required to do so in a Registry Office (though the Church was, somewhat inconsistently, happy thereafter to offer a ceremony of blessing). For the constitutional and religious oddities, see S. Cretney, “Royal Weddings, Legality and the Rule of Law” (2007) 37 Fam. Law 159 and “Royal Marriages: Some Legal and Constitutional Issues” (2008) 124 LQR 218.

ders.¹⁰⁴ It is the male role to lead and the female role to support; the female role to advise and conciliate, the male role to decide and fight. The genders are of equal worth, but different – they have (it is said) complementary roles. The very structure of many churches, the Roman Catholic Church most obviously, reflects this complementarianism and it underpins the continued opposition in the Church of England to women in leadership roles such as bishops.¹⁰⁵ But it goes much further and complementarity of the genders in all aspects of life is part of the Catechism of the Roman Catholic Church.¹⁰⁶ Applying complementarian theology to marriage allows that institution to be one that both reflects *and demands* different gender roles. Without complementarity the relationship, whatever it is, is not marriage: thus it is simply impossible for a relationship between two people of the same sex to be a “marriage”.

It cannot be denied that, for many long centuries, the law reflected this understanding of the essential complementarity of the genders. Marriage in the United Kingdom (and elsewhere) was a relationship in which the man alone had legal authority to decide how, and where, the couple were to live¹⁰⁷ and how, and by whom, any children were to be brought up;¹⁰⁸ the woman’s position was one of utter dependency, with all her property trans-

¹⁰³ So for example the Princess Royal (sister to the Prince of Wales) chose religious ceremony in the Church of Scotland in order to marry her second husband, her first husband still being alive.

¹⁰⁴ See generally U. King *Religion and Gender* (Blackwell, 1995).

¹⁰⁵ Though the Church of Scotland has for some decades permitted women ministers, and has in recent years been headed by women, this is a relatively recent phenomenon. Its Calvinist founder, John Knox, published in 1558 the wondrously titled *The First Blast of the Trumpet Against the Monstruous [ie unnatural] Regiment [ie rule] of Women*.

¹⁰⁶ *Catechism*, 2333 – 2335.

¹⁰⁷ In Scotland this rule survived until 1984: see Law Reform (Husband and Wife) (Scotland) Act 1984.

¹⁰⁸ Only with the Guardianship of Infants Act 1925 did the various jurisdictions in the United Kingdom accept that the claim of the father to control of his child’s upbringing was not superior to the claim of the mother.

Header

ferring automatically on marriage into the name (or at least control) of her husband;¹⁰⁹ the woman was (until as late as 1989¹¹⁰) presumed by the law to have given ongoing and non-retractable consent to her husband's sexual advances (ie could not – in law – be raped by her husband whether or not – in fact – she was raped by him). Traditionally marriage was a relationship characterised by power and dependency, with an essential complementarity between the husband's duty of support and the wife's obligation to obey, between male dominance and female subservience.

However, notwithstanding this traditional acceptance of complementarity, the law has moved away from all of these positions and today reflects the social understanding that relations between the genders should be based on equality and partnership, not domination and dependency. The challenge for traditional theologians is to explain why complementarity should continue to govern eligibility to marry (and church structures) but not anything else – not even the consequences of marriage. For complementarity, if it makes any sense, is an all or nothing doctrine: if marriage must retain complementarity between the male head of the family and his female helpmeet,¹¹¹ then so too must the whole of society and all its laws and institutions. To say “the structure of our church, and rules for entry into marriage, requires male leadership over the female, but nothing else does” has no logic and, in truth, by delimiting the scope of complementarity concedes the point that male dominance - including in church governance and marriage – is a social construct rather than a natural phenomenon.

¹⁰⁹ A rule gradually ameliorated by a series of statutes including, for England and Wales, the Married Women's Property Acts 1870, 1882 and 1893, and, for Scotland, the Married Women's Property (Scotland) Acts 1881 and 1920.

¹¹⁰ *S v. Lord Advocate* 1989 SLT 469 (for Scotland); *R v. R (Rape: Marital Exemption)* [1991] 4 All ER 481 (for England and Wales).

¹¹¹ *Genesis* 2:18.

All social constructs change as society itself changes, and the acceptance by society of gender equality is, in itself, the denial of a literalist (or unchangeable) approach to scriptural interpretation. St Paul told the Corinthians that women had to be silent in church¹¹² and this is one of the major scriptural bases for the doctrine that only men may take on leadership roles in religious organisations. But modern, or liberal, theology regards St Paul's words as doing no more than reflecting the makeup of the ancient society in Corinth and denies that it sets down any divinely ordained rule that must be applied today, and forever more. If the genders are equal – and modern society, and its legal rules, strive to make that aspiration a reality – then in neither church governance nor marriage is there a need to retain gender-specific roles. Traditional marriage may well have been unable to accommodate same-sex couples because of the inherent complementarity of its patriarchal power-structure, but modern marriage, as understood (and wanted) by the vast majority of the population in the United Kingdom (and elsewhere in the western world), as a partnership of equals, can accommodate same-sex couples just as easily as opposite-sex couples, and it is good social policy for the law, through its design of marriage, to encourage that more modern view of relationships. If opening marriage to same-sex couples helps to remove once and for all an understanding that marriage involves a power-structure based on expected gender roles then that opening will have served a valuable social function that is justification enough for doing so.

Problems with Opening Marriage

None of the arguments currently being propounded by religious traditionalists, being based on scriptural truths that are not universally accepted, or are not universally accepted to be immutable, make much sense to a secular lawyer and they should have little weight with legislators committed to

¹¹² 1 *Corinthians* 14: 34.

Header

providing universal laws, applicable to all citizens, whatever form of faith (if any) they adhere to. But it does not follow from the removal of religious precepts from the legal concept of marriage – as it seems to be assumed in the USA to follow – that the law should provide one institution for all couples, and that that institution should be called “marriage”. Marriage today has been designed to suit the needs of opposite-sex couples and while the needs of same-sex couples very substantially overlap those of their heterosexual counterparts it would be wrong to assume that the issues facing each type of couple are identical in every respect. It has already been accepted that the rules concerning sexual behaviour within the relationship (adultery, impotency and consummation) are uniquely suited to opposite-sex couples and have no (legal) relevance to same-sex couples.¹¹³ The practical issues facing a male couple who wish to have children are very different – and demand different legal solutions – from those facing female couples (or opposite-sex couples) with the same wish. The financial consequences of marriage and separation, designed primarily to address the structural economic imbalance in society between men and women, are not self-evidently suitable when a same-sex couple, between whom financial parity is more likely, separate.¹¹⁴ The problem of forced marriages as a means of creating family alliances will simply not arise in relation to same-sex marriage.¹¹⁵

¹¹³ See the UK Government’s *Responses to Civil Partnership: A Framework for the Legal Recognition of Same-Sex Couples*, (Department of Trade and Industry, 2003) at p. 36. The UK Government has, it is true, rather retracted from that acceptance in *Equal Civil Marriage: A Consultation* (March 2012) for it expresses an intention to apply the rules of adultery and consummation to marriage involving same-sex couples, with the surely misplaced expectation that the courts will develop these concepts beyond their current heterosexual parameters.

¹¹⁴ See further, K. Norrie, “Marriage is for Heterosexuals. May the Rest of Us Be Saved From It” (2000) 12 CFLQ 363.

¹¹⁵ A fact recognised by the Scottish Parliament when it enacted the Forced Marriage etc (Protection and Jurisdiction) (Scotland) Act 2011 providing civil remedies to those being

Using marriage as the universal union for all couples also runs the risk of assimilating same-sex couples into bland and constraining heteronormativity. The effect of opening marriage is, Nancy Polikoff has long argued,¹¹⁶ far less socially transformative than the creation of parallel institutions (such as civil partnership) or a series of institutions of equal worth. Marriage ensures that difference is made safe by being minimised, rather than accepted for what it is and celebrated.¹¹⁷ The powerful political alliance between gay rights and feminist activists, who have a common enemy in the doctrine that sex is legitimate only when potentially procreative, has withered as marriage, previously seen by many feminists as part of the problem, comes to be seen in the LGBT community as the solution. Yet the identity of the arguments against advancing the rights of women and the rights of gay people is seen with naked clarity as the Church of England interminably debates the issue(s) of women bishops and gay bishops.

It is in any case naïve at best to see marriage as the solution to society's ills. Even if we accept that marriage is an important stabilising influence on society, it does not follow that it is more effective in providing that stability than good social welfare, parenting support, education and equal opportunities policies. The focus on marriage as a solution is, in other words, dangerously short-sighted. Homophobic hate crimes will not disappear when marriage is opened to same-sex couples. Equality and non-discrimination in employment and in the provision of goods and services is at least as im-

forced into marriage but not civil partnership. The power to extend the Act in future to civil partnership is included if the issue does arise, but it is assumed that it will not.

¹¹⁶ "We Will Get What We Ask For: Why Legalising Gay and Lesbian Marriage Will Not Dismantle the Legal Structure of Gender in Every Marriage" (1993) 79 Va. L. Rev. 1535; *Beyond (Straight and Gay) Marriage* (Beacon Press, Boston 2008).

¹¹⁷ The whole thrust of the law, both at the UK and the European level, is to extend rights and obligations to same-sex couples who seek to participate in traditional, nuclear family-style relationships: see C. Stychin *Governing Sexuality: The Changing Politics of Citizenship and Law Reform* (Hart, 2003).

Header

portant for individual gay men and women as civil partnership and marriage is for same-sex couples. The focus on marriage as a goal, in other words, adopts the utterly traditional approach of preferencing the couple over the individual, preferencing conformity over diversity. Not for nothing did the British (Conservative) Prime Minister, David Cameron say in 2011 “I don’t support gay marriage in spite of being a Conservative. I support gay marriage because I am a Conservative.”¹¹⁸

Conclusion

Marriage is likely to be opened to same-sex couples in the United Kingdom within a very few years of this book being published, and that will effect a truly remarkable transformation in the legal position of gay men and lesbians from the days of criminality, a mere generation ago. We should not, however, expect too much from the opening of marriage to same-sex couples, even with its message of tolerance, respect and equality. Opening marriage alone will not prevent hate speech and homophobic assault, nor remove individual feelings of moral superiority over those of a minority sexual orientation. These things can be reduced not only by the law deeming them unacceptable,¹¹⁹ but by society in all its manifestations accepting the moral equivalence of homosexuality and heterosexuality. Today, both legislation and case law in the United Kingdom give out the unambiguous message that gay men and lesbians, and same-sex couples, pose no threat to the good of society, and are entitled to be accorded the respect and dignity that the heterosexual majority take for granted. That message, however,

¹¹⁸ David Cameron, MP, “Leadership for a Better Britain”, speech to Conservative Party Conference October 5, 2011 (available on Conservative Party website, “speeches”).

¹¹⁹ See K. Goodall, “Challenging Hate Speech: Incitement to Hatred on Grounds of Sexual Orientation in England, Wales and Northern Ireland” (2009) 13 Int. J.H.R. 211. Limitations on free speech which prevent the distribution of leaflets that were contemptuous of and disparaging towards homosexuals are not inconsistent with Art. 10 of the European Convention

fails to achieve complete social transformation in attitudes because the opposing message, that same-sex relationships hurt society and its members, continues to be propounded by religious traditionalists, who still feel free to proclaim the moral superiority of heterosexuality over homosexuality, even when they would hesitate to proclaim, openly, the moral superiority of white people over black, or the superiority of Christian people (as people) over Jew or Muslim – or the superiority of the male over the female. Anti-semitism and racism have long since been expelled from the sphere of respectable political (and indeed religious) discourse and it is today limited to the extreme fringes of right-wing politics. Anti-gay sentiments are, however, not yet considered to be beyond the pale, or unacceptable in normal political discourse, almost solely because they continue to receive a legitimacy and a respectability from scriptural texts which religious leaders assert are still valid, even while they accept that other biblical injunctions (such as, for example, the Judeo-Christian God's hysterical demands for genocide in *Joshua*¹²⁰) may, even must, be disregarded. The message of homosexual inferiority, proclaimed from pulpits and bishops' palaces, is heard and translated into a message of intolerance and hatred by thugs, who then feel aggrieved when they are charged with hate crime as opposed to common assault.

Gay men and lesbians would not be the only losers if the state were to defer to religious (or cultural) traditionalism and allow religious beliefs to qualify human rights and equality norms. The risks to women, in particular, are great for patriarchy is an inescapable feature of most mainstream religions across the world. Giving priority to equality over religious beliefs and practices – even when that involves the sudden subversion of many hundreds of

on Human Rights: *Vejdeland v. Sweden* (App 1813/07), 9th February 2012. [See comment at \(2012\) EHRLR 348.](#)

Header

years of social, legal and religious discrimination against sexual minorities – is, therefore, the best guarantee that every citizen will be allowed to lead their life as a dignified human person, free to shape their life and relationships according to their own nature, and with as much opportunity to exercise choice as anyone else. It is the grand purpose of the law to minimise religion’s proven capacity to hurt individuals, particularly those who are “other”.¹²¹ Preferencing equality and non-discrimination norms of gay and lesbian people over religious freedom is a powerful message that the state is willing to fulfil its duty in this regard, and is the ultimate acceptance of gender equality itself.

¹²⁰ Joshua 6:21 and 10:40-41.

¹²¹ Including, of course, the “otherness” of women, in Simone de Beauvoir’s sense: *The Second Sex* (1949).